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Third-Party Discovery Subpoenas in Arbitration

While not every arbitration will involve evidence from third parties, all litigators should be familiar with their ability to compel discovery of such evidence.

By **Jason S. Giaimo** | December 18, 2020

In commercial litigation, third-party discovery subpoenas are routine and the authority of the parties and courts to issue them is well-recognized. Given the public policy favoring arbitration, one might assume that third-party discovery subpoenas in arbitration are equally routine. Not so, however. As this article explains, the majority of courts to consider the issue have held that in an arbitration governed by the Federal Arbitration Act (FAA), arbitrators may not compel a third party's compliance with a pre-hearing discovery

subpoena. This constitutes a significant departure from commercial litigation practice in state and federal court and has serious implications for any litigator as they prepare for and proceed with arbitration.

Compelling Third-Party Discovery Before a Hearing Under Federal Law. The source of confusion concerning the inability of arbitrators to compel pre-hearing discovery from non-parties stems from §7 of the FAA, which provides, in pertinent part, that "arbitrators … may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." 9 U.S.C. §7. Until the U.S. Court of Appeals for the Second Circuit addressed this issue head-on in *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210 (2d Cir. 2008), many New York litigants were of the view that an arbitrator could compel a non-party to produce documents prior to an arbitral hearing, just as courts and parties could do in state and federal court proceedings. Ultimately, however, the Second Circuit in *Life Receivables Trust* expressly held that §7 of the FAA does not authorize arbitrators to compel pre-hearing document discovery from entities or individuals not a party to the arbitration proceeding. Id. at 217. However, that does not mean that an arbitrator lacks all power to compel the production of documents from a non-party in an FAA-governed arbitration. Rather, as the Second Circuit explained, arbitrators may, consistent with §7 of the FAA, order any person to produce documents so long as that person is called as a witness at a hearing, regardless of whether that hearing is the ultimate hearing on the merits. See id. at 218. Thus, an arbitrator may issue a subpoena requiring a non-party's attendance at an arbitral hearing and to bring responsive documents to such hearing. See id.; see also *Stolt-Nielsen SA v. Celanese AG*, 430 F.3d 567, 569 (2d Cir. 2005) (rejecting the argument of the non-party seeking to quash a subpoena that §7 permits arbitrators to summon witnesses "only to a merits hearing akin to a full-blown trial.").

The Third Circuit is in accord with the Second Circuit (see *Hay Group v. E.B.S. Acquisition*, 360 F.3d 404 (3d Cir. 2004)), while the Eighth Circuit has held to the contrary, reasoning that "implicit in an arbitration panels' power to subpoena relevant documents for production at a hearing is the power to order the production of relevant documents for review by a party prior to the hearing." *In re Sec. Life Ins. Of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000). The Fourth Circuit has struck a middle ground, holding that while §7 generally precludes discovery subpoenas, discovery subpoenas may be allowed in exceptional circumstances upon a showing of special need or hardship. See *COMSAT v. Nat'l Sci. Found.*, 190 F.3d 269, 276 (4th Cir. 1999).

While the Second Circuit did not directly address the issue of pre-hearing depositions in *Life Receivables Trust*, and it arguably remains somewhat of an open question, the strong implication of the reasoning in that decision—that §7 requires the attendance of a witness at a hearing before one or more arbitrators—is that pre-hearing depositions are not permitted. However, arbitral subpoenas that specifically require a witness to appear and

give testimony at a pre-merits hearing have been enforced. See, e.g., *Stolt-Nielsen SA*, 430 F.3d at 581 ("Section 7 unambiguously authorizes arbitrators to summon non-party witnesses to give testimony and provide material evidence before an arbitration panel."); *Bailey Shipping Ltd. v. Am. Bureau of Shipping*, 2014 WL 3605606, at *4 (S.D.N.Y. July 18, 2014) (denying a motion to quash and holding that the arbitral subpoena validly commanded third parties to appear for testimony before the arbitrators and bring with them documents related to the subject of their testimony); *In re Nat'l Fin. Partners*, 2009 WL 1097338, at *1 (E.D. Pa. April 21, 2009) (same).

Compelling Third-Party Discovery in Arbitration Under New York State Law. Adding further complexity to pre-hearing discovery subpoenas in arbitration, there exists a conflict between federal and state courts in New York. Citing the Fourth Circuit's decision in *COMSAT*, the Appellate Division, First Department has held that the FAA does permit parties to an arbitration agreement to obtain pre-hearing discovery from non-parties in cases of "special need." See *ImClone Sys. v. Waksal*, 22 A.D.3d 387, 388 (1st Dep't 2005). Specifically, the First Department in *ImClone Sys.* held that where there is a showing of "'special need or hardship,' such as where the information sought is otherwise unavailable," pre-hearing depositions and document demands of non-parties may be directed in arbitration. See id. at 388.

While *ImClone Sys.* pre-dates *Life Receivables Trust*, there has not been any New York state appellate decision after *Life Receivables Trust* that either follows or overrules *ImClone* in light of *Life Receivables Trust*. Moreover, at least one New York state trial court has followed *ImClone* after and notwithstanding *Life Receivables Trust*, finding that in an arbitration governed by FAA §7, compliance with a pre-hearing document subpoena served on a non-party may be ordered upon a showing of special need or hardship (although in that case the court found that this test was not satisfied). See *Connectu v. Quinn Emanuel Urquhart Oliver & Hedges*, No. 602082/08, slip op. at 10 (Sup. Ct. N.Y. Cty. March 11, 2010).

What Should Parties Do When Documents and Testimony May Be Needed from Non-Parties? While the ability of parties to obtain documents and testimony from non-parties in FAA-governed arbitrations is far more circumscribed than the ability of litigants to obtain evidence from non-parties in state and federal actions, the parties still have some options available to them to ensure non-party discovery is available. First, the parties may contractually agree that state law arbitration procedures shall govern their arbitration, thereby triggering the federal policy in favor of enforcing the parties' agreed-upon procedures. However, to use state arbitration rules instead of the FAA, the parties' contract should explicitly state so. See *Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 63-64 (1995) (holding that generic choice-of-New-York-law clause in contract containing arbitration clause to which the FAA applies should be construed to make applicable only substantive principles of New York law and not New York law restricting the powers of arbitrators); *Bacardi Int'l Ltd. v. V. Suarez & Co.*, 719 F.3d 1, 13 n.16 (1st Cir.

2013) ("[T]o use local arbitration rules instead of the FAA, the contract must say so unequivocally"). In addition to the potential increased availability of third-party discovery, utilizing state law arbitration procedures may also confer upon counsel the ability to issue subpoenas, whereas §7 of the FAA does not. See N.Y. C.P.L.R. §7505 ("An arbitrator and any attorney of record in the arbitration proceeding has the power to issue subpoenas"); *Nat'l Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999) (Section 7 "explicitly confers authority only upon arbitrators; by necessary implication, the parties to an arbitration may not employ this provision to subpoena documents and witnesses").

Second, parties may still seek documents from non-parties in advance of an arbitral hearing, despite an arbitrator's lack of authority to compel such production, with the hope that the non-party will comply with the document request to avoid the need to appear at a hearing and testify. Such practical considerations could save all involved significant time and expense. Third, parties may require non-parties to appear at an arbitral hearing to testify and bring documents with them, including hearings not on the merits of the underlying dispute. See *Life Receivables Trust*, 549 F.3d at 218; *Stolt-Nielsen SA*, 430 F.3d at 581.

Ultimately, while not every arbitration will involve evidence from third parties, all litigators should be familiar with their ability to compel discovery of such evidence. And when drafting arbitration clauses for clients, it's imperative to consider whether your client may wish to subpoena third party evidence if any dispute arises and, if so, what jurisdiction's laws should govern.

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